IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. LI SHAOMING, MO HAILONG, also known as Robert Mo, WANG LEI, WANG HONGWEI, YE JIAN, LIN YONG, and MO YUN Defendants.	Case No. 4:13-CR-147 REPLY IN SUPPORT OF DEFENDANT MO HAILONG'S MOTION TO COMPEL PRODUCTION OF NOTICE CONCERNING COVERT SURVEILLANCE **(ORAL ARGUMENT REQUESTED)**

The Defendant, Mo Hailong ("Mr. Mo") submits this reply in support of the portion of his motion to compel discovery (Dkt. No. 153) that the government addressed in its response filed January 16, 2015 (Dkt. No. 177). Mr. Mo further requests that oral argument be scheduled on this portion of his motion to compel.

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INTRODUCTION

While other, more substantial requests concerning the government's methods of evidence collection in this case are in the offing, the relief Mr. Mo seeks here is quite modest: He simply asks that the government be required to tell him what items, of the evidence *already in his possession*, were obtained through the Foreign Intelligence Surveillance Act ("FISA") or similar methods. He requires this information so he can formulate coherent motions to suppress where statutory and constitutional grounds exist. Both the text of the FISA statute and the Federal Rules of Criminal Procedure support Mr. Mo's request. With no on-point authority, but nonetheless with a straight face, the government contends that Mr. Mo should be constrained to filing motions to suppress evidence when he does not know where that evidence came from or how the government got it. The government's self-evidently illogical position should be rejected and Mr. Mo should get the information he seeks.

FACTUAL BACKGROUND

Discovery in this case has, by any account, proceeded very slowly and been exceptionally voluminous and complex. To address the gaps and delays in discovery, Mr. Mo, when this case was one year and four days old, filed a wide-ranging motion to compel on December 15, 2014. On January 6, 2015, Mr. Mo's counsel and attorneys for the government held a "meet and confer" session in order to determine what parts of the motion to compel could be resolved without court action. The government at that time indicated an additional discovery production was forthcoming at the end of January 2015. That anticipated production was subsequently memorialized in this Court's order of January 16, 2015 (Dkt. No. 175).

The parties agreed to hold Mr. Mo's motion in compel in abeyance pending the January 30, 2015 production with one exception: The parties determined that they could not agree on the government's obligation to identify materials that the government obtained through FISA or some similar procedure. The parties described the issue to be litigated in their joint filing of Agreed Pretrial Deadlines (Dkt. No. 168):

> Specifically, defendants request that the government identify all documents and information obtained through means to which some measure of secrecy or classification is attached, such that defendants would not be, in the government's view, entitled to complete access to the legal authority and facts supporting the search. This includes but is not limited to identification of all information seized pursuant to FISA.

Id.

To be clear, Mr. Mo does not in this proceeding seek production of classified submissions to the Foreign Intelligence Surveillance Court ("FISC") or other similar classified information. He only asks to be told what information the government seeks to use at trial that was obtained through FISA or other allegedly secret procedures so that he may intelligently litigate motions to suppress and discovery matters regarding those items. The actual issues of Mr. Mo's access to the classified FISA filings and similar materials themselves, and the issue of suppression of secretly-obtained evidence, will be taken up in later motions.[1]

The factual background for the current dispute is as follows: On March 11, 2014, the government provided notice to Mr. Mo of its intent to use evidence obtained under FISA procedures against him. That notice, which consisted of a single sentence, stated pertinently that:

> … pursuant to Title 50, United States Code, Sections 1806(c) and 1825(d), the United States intends to offer into evidence, or otherwise use or disclose in any proceedings in the above-captioned matter, information obtained or derived from electronic surveillance or physical search conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1812 and 1821-1829.

Notice (Dkt. No. 42) at 1.[2] Although the notice stated generically that FISA-derived evidence would be used against Mr. Mo, it did not say what that evidence was, nor has the government made that disclosure since. That is the fighting issue in this motion.

It is apparent that some evidence in this case has been obtained through conventional search warrants, and the applications, warrants, and returns associated with those warrants have been or are being produced. (The January 30, 2015 production is still under review by Mr. Mo's attorneys.) But there is also an extensive collection of information in this case, including apparent intercepts from Mr. Mo's phone and intercepts of his email messages, both first produced in October 2014, that do not have apparent sources. Mr. Mo here seeks the identification of those sources.

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[1] Accordingly, the government's response to this motion (Dkt. No. 177; hereafter "Response") is premature in addressing the circumstances under which FISA applications, orders, and related materials must be disclosed to the defense. *See* Response at 6-8. Those issues are not now before the Court.

[2] On October 15, 2014 the government provided a similar notice to the co-defendant Mo Yun. (Dkt. No. 124).

For the reasons that follow, the Court should Order the government (1) to provide notice of any covert surveillance techniques known to the DOJ National Security Division ("NSD") or the FBI Counterintelligence Division as to which Mr. Mo is an aggrieved person, to the extent the government intends to use or disclose evidence obtained or derived from that surveillance; and (2) to identify the evidence obtained or derived from any surveillance of which the government gives notice.

ARGUMENT

This portion of Mr. Mo's motion to compel seeks answers to two questions: First, what covert surveillance techniques did the government use to obtain the evidence it plans to offer against Mr. Mo? Second, what evidence did each of those techniques yield? Mr. Mo needs answers to those questions to file appropriate suppression motions. The government has the requested information readily available, but refuses to provide it.

The answer to the first question is, in part, quite simple. The government has already given a notice under FISA of an intent to use FISA-derived evidence. The real issue, therefore, is whether the government has used *any other* classified evidence-gathering techniques in addition to FISA. There, the government seeks to erect an artificial wall between the local AUSAs and FBI agents on one hand, and the remainder of the DOJ and FBI on the other. The government tells us that the *local* actors are *unaware* of any such evidence-gathering, but the government disclaims responsibility for putting that simple question to any other government person or agency, including the

DOJ NSD and the Counterintelligence Division of the FBI--both of which are deeply involved in this case behind the scenes.

The government thus seeks to restore the wall between the prosecution and intelligence functions of the DOJ and the FBI that Congress tore down over a decade ago when it enacted the PATRIOT Act. *See In re Sealed Case*, 310 F.3d 717, 732-33 (Foreign Intelligence Court of Review 2002) (describing the "wall" and its removal); http://www.justice.gov/nsd/sections-offices (NSD website noting the "lowering of the 'wall' between intelligence and law enforcement investigations" and the "enhanced coordination between intelligence and law enforcement personnel"). The DOJ and the FBI cannot compartmentalize themselves in this manner to evade the government's disclosure obligations.

As to the second question, the answer for FISA activities is again simple and obvious: Of course the government knows what evidence it obtained under FISA; it could probably list that evidence for Mr. Mo in a matter of minutes. It simply refuses to do so. As for non-FISA means of evidence collection, the second question begs the answer to the first. The local prosecutors must learn what all investigation has been done in this case, and the government must be required to tell them. Limiting the government's obligation of disclosure to local authorities and to their actual knowledge (with no obligation of inquiry) creates the proverbial hole big enough to drive a truck through. The government cites no authority for such a limitation, and it would eviscerate the intent behind any notice requirement at all.

I. NOTICE OF SURVEILLANCE TECHNIQUES.

The government has at its disposal a variety of covert surveillance techniques. For example, with an order from the FISC, it can conduct FISA electronic surveillance, 50 U.S.C. §§ 1801-1812, or FISA Amendments Act ("FAA") surveillance, 50 U.S.C. §§ 1881a-1881g. FISA also authorizes covert physical searches--known as "sneak and peak" searches--under certain circumstances. 50 U.S.C. §§ 1821-1829. Under 50 U.S.C. § 1861, the government can obtain an order from the FISC requiring telecommunications carriers to provide call detail records. Apart from FISA, the National Security Agency conducts surveillance of overseas phone calls under Executive Order 12333. *See* 1 David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* § 17:18 at 663-64 (2d ed. 2012) ["Kris & Wilson"]; Charlie Savage, *Reagan-Era Order on Surveillance Violates Rights, Says Departing Aide*, New York Times, Aug. 13, 2014 (describing use of E.O. 12333 to collect Americans' communications abroad) (available at http://www.nytimes.com/2014/08/14/us/politics/reagan-era-order-on-surveillance-violates-rights-says-departing-aide.html). The government may use other forms of covert surveillance as well.[3]

Each of these surveillance techniques presents important statutory and constitutional issues. Because of the secrecy surrounding the techniques, however, most targets never know they have been surveilled and thus cannot challenge the government's action. As the Supreme Court has recognized, the principal means of challenging the legality of covert government surveillance is through a motion to suppress in a criminal case where the government seeks to use evidence derived from the surveillance. *See Clapper v. Amnesty International*, 133 S. Ct. 1138, 1154 (2013).

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[3] Of course, with an appropriate order from a United States District Court, the government can conduct so-called Title III surveillance, 18 U.S.C. §§ 2510-2522. Based on the discovery to date, however, the government does not appear to have used Title III in its investigation of Mr. Mo.

A criminal defendant can only make such a challenge, however, if he receives notice that the government "intends to use or disclose information obtained or derived from" the surveillance. *Id.* Congress has recognized this point. It requires notice to the defense when the government "intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding . . . against any aggrieved person, any information obtained or derived from an electronic surveillance [or physical search] of that aggrieved person" under FISA, 50 U.S.C. §§ 1806(c), 1825(d), or the FAA, *id.* § 1881e.[4] Although 50 U.S.C. § 1861 and Executive Order 12333 do not contain express notice provisions, the principles that require notice under FISA and the FAA apply equally there. *See* 18 U.S.C. § 3504 (requiring the government to "affirm or deny the occurrence" of alleged "unlawful acts," defined to include electronic surveillance that violates "the Constitution or laws of the United States").

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[4] An "aggrieved person" under FISA "means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance," 50 U.S.C. § 1801(k), or "a person whose premises, property, information, or material is the target of physical search or any other person whose premises, property, information, or material was subject to physical search," *id.* § 1821(2). Thus, Mr. Mo is an "aggrieved person" as to--and has standing to challenge--any electronic surveillance that either targeted him or intercepted his communications, and any physical search that either targeted him or involved a search of his "premises, property, information, or material."

The government appears to acknowledge that it must provide notice of such "'classified' or 'secret' evidence." Response at 2. It has already provided a FISA notice (Clerk's No. 42), although--as discussed below--it refuses to identify the evidence it obtained through FISA surveillance. But the government seeks to limit its obligation to provide notice concerning other forms of covert surveillance to the actual knowledge possessed by "the U.S. Attorney's Office [and] the FBI personnel involved with this case." Response at 2. It seems more than apparent that federal authorities outside of Iowa -- we think likely the DOJ NSD and the FBI Counterintelligence Division -- are in possession of classified information about aspects of this case which are not shared, or not shared timely, with local officials. The selective disclosures to the local prosecutors were most apparent at the October 1, 2014 hearing on Mo Yun's motion to sever, where those prosecutors out of the blue on the morning of the hearing withdrew certain pleadings and reported that DOJ had directed them to stand mute. Then, two days later and without explanation, they reinstated the withdrawn pleadings. *E.g.*, 10/1/14 Hearing Tr. 4; Clerk's No. 116. From this we conclude that it is, for example, a virtual certainty that the local prosecutors and agents have no idea whether information obtained through FAA surveillance, through use of 50 U.S.C. § 1861, or under E.O. 12333 was included in the applications submitted to the FISC for the FISA surveillance that the government intends to use.

In resolving other aspects of Mr. Mo's discovery motion, the Court will likely have to address the government's obligation to produce responsive information in the possession of agencies other than the DOJ and the FBI. *E.g.*, Mo Discovery Brief

(Clerk's No. 153-4) at 9-10 (citing cases).[5] For purposes of this aspect of the motion, however, it is sufficient to hold that the government must provide notice of surveillance techniques known to the DOJ NSD or the FBI Counterintelligence Division.

A. The DOJ National Security Division.

The DOJ NSD functions as a liaison between prosecutors and agents on one hand and the intelligence community on the other. *See* 1 Kris & Wilson § 1:8 at 35-36. As the NSD's website explains: "The NSD's organizational structure is designed to ensure greater coordination and unity of purpose between prosecutors and law enforcement agencies, on the one hand, and intelligence attorneys and the Intelligence Community, on the other, thus strengthening the effectiveness of the federal government's national security efforts." http://www.justice.gov/nsd/about-division. The NSD Litigation Section "help[s] prosecutors handle evidentiary and discovery issues in [FISA-related] matters," including this matter. http://www.justice.gov/nsd/sections-offices#operations.

The DOJ NSD Litigation Section attorneys assisting with this case know or can readily determine which surveillance techniques produced the evidence against Mr. Mo. First, attorneys from another section of NSD--the Operations Section--"represent[] the government before the [FISC]" and "prepar[e] and fil[e] all applications for Court orders pursuant to FISA." *Id.* In other words, NSD Operations Section attorneys prepared and filed the FISA applications that produced the FISA evidence that the government intends to use against Mr. Mo. The NSD Litigation Section attorneys assisting with this case can ask their colleagues in the Operations Section what covert surveillance techniques produced information that was included in the applications.

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[5] Indeed, the Department of Justice's own guidance for federal prosecutors in cases like this one imposes obligations to obtain information from agencies beyond the DOJ and the FBI. *See* United States Attorney's Manual, Criminal Resource Manual §2052. http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

Second, DOJ NSD Litigation Section and Operations Section attorneys routinely consult with the FBI Counterintelligence Division, which initiates covert surveillance of the kind at issue here. As discussed below, those FBI counterintelligence agents know what information was used in the FISA applications that targeted Mr. Mo.

Through these means, the DOJ NSD knows or can readily determine which covert surveillance techniques were used to intercept Mr. Mo's communications or otherwise obtain information about him and the extent to which information derived from those techniques was included in the FISA applications at issue in this case. The Court should order the government to provide notice of any such techniques known to the DOJ NSD.

B. The FBI Counterintelligence Division.

The FBI Counterintelligence Division plays two roles that are significant here. First, it oversees the investigation of potential economic espionage offenses.[6] Agents from the Counterintelligence Division were undoubtedly involved in the investigation of this case, which charges a conspiracy to violate the Economic Espionage Act. Those agents have knowledge of the covert surveillance techniques used to obtain evidence the government intends to use or disclose in this case.

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[6] *See* http://www.fbi.gov/about-us/investigate/counterintelligence/economic-espionage; 1 Kris & Wilson § 1:7 at 33-34.

Second, agents from the FBI Counterintelligence Division provide declarations in support of applications to the FISC for FISA surveillance. *See* 1 Kris & Wilson § 6:2 at 156-57. The agent providing the declaration must conduct a comprehensive review of relevant information. *See id.* § 6:3 at 161-63. Thus, the FBI counterintelligence agents who furnished the declarations that supported the applications for FISA surveillance that the government seeks to use in this case know what surveillance techniques produced the information on which the declarations relied. The government has no basis for withholding from the defense the information that those FBI agents possess.

The Court should thus order the government to provide notice of any covert surveillance techniques known to the FBI Counterintelligence Division as to which Mr. Mo is an "aggrieved person," to the extent the government intends to use or disclose any evidence obtained or derived from that surveillance.

II. NOTICE OF THE EVIDENCE OBTAINED THROUGH SURVEILLANCE.

The government resists notifying the defense and the Court of the evidence that it has obtained under FISA and other covert surveillance techniques. Response at 3-6. It observes that "[i]n a traditional criminal case, defense counsel analyzes the discovery, determines what suppression motions to make, and files them. The government then responds." Response at 4.

True enough. But in a "traditional criminal case," the government provides a search inventory (Fed. R. Crim. P. 41(f)(1)(B), (C)) and a log of the calls intercepted under Title III. The government also provides the search warrant and accompanying affidavit (for physical searches) and the Title III application and order (for electronic surveillance). The defendant thus knows precisely what evidence was obtained by which investigative techniques and can prepare appropriate suppression motions.[7]

Here, by contrast, the government has produced a great mass of discovery without indicating which portions were obtained through FISA or other covert surveillance techniques. For example, the government has produced recordings of conversations obtained through listening devices placed in automobiles and of calls from and to a telephone associated with Mr. Mo. The defense can assume that the recordings were obtained through FISA surveillance--but if that assumption is wrong, the defense and the Court will waste many hours litigating FISA issues unnecessarily. It would be a simple matter for the government to confirm that the car conversations and the calls were obtained under FISA orders. Other information obtained through FISA electronic surveillance should be equally easy to identify. To the degree any "list" or "spreadsheet" is necessary (Response at 4) it would likely be only a few entries long.

Similarly, if the government obtained evidence through a FISA search, as its notice suggests, it can identify that evidence by category or Bates-number range. Identification of this evidence is essential for the defense to address, among other points, (1) whether the government properly minimized the seized material, 50 U.S.C. §§ 1821(4), 1823(a)(4), 1824(a)(3), 1824(c)(2)(A), 1825(a), and (2) whether the FISA applications clearly erred in certifying that the information sought through the FISA

[7] In this case, for example, the government has produced or agreed to produce in discovery several "traditional" search warrants and search inventories. *E.g.*, Dkt. No. 153-1 at 6 (government has agreed to produce legible copies of previously produced search warrant returns); Dkt. No. 153-2 (partial discovery inventory including search warrants and returns).

searches could not "reasonably be obtained by normal investigative techniques," *id.* §§ 1823(a)(6)(C), 1824(a).

The government expresses sympathy for "the difficulties faced by defense counsel" in litigating the FISA issues, Response at 4 n.4, but insists the Court is powerless to require further disclosure. That is incorrect for two reasons. First, the FISA statute's notice provisions plainly require the government to identify the information at issue. The notice provision governing electronic surveillance provides:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, *any information* obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use *that information* or submit it in evidence, notify the aggrieved person and the court or other authority in which *the information* is to be disclosed or used that the Government intends to so disclose or so use *such information.*

50 U.S.C. § 1806(c) (emphasis added); *see id.* § 1825(d) (similar notice provision for FISA physical searches). The repeated references in § 1806(c) to "the information" and "such information" clearly require that the government's notice identify the information at issue. The government cannot merely state (as it has here) that some unidentified FISA-derived evidence exists somewhere in the enormous volume of evidence it intends to use or disclose in the course of the proceedings. The government's gamesmanship is especially indefensible because there is no conceivable national security basis for refusing to link particular, already disclosed, evidence to particular, already disclosed, surveillance techniques.

Independently, Fed. R. Crim. P. 12(b)(4)(B) authorizes the Court to require notice of the information obtained through FISA and other covert surveillance techniques. That rule permits the defense, "in order to have an opportunity to move to suppress evidence," to "request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16." Fed. R. Crim. P. 12(b)(4)(B). Numerous courts have held that Rule 12(b)(4)(B) requires the government, in situations similar to this one, to identify the evidence it intends to use in its case-in-chief that is potentially subject to suppression to allow the defense to make suppression decisions. *See, e.g., United States v. Cruz-Paulino*, 61 F.3d 986, 992-93 (1st Cir. 1995) (district court erred in admitting evidence obtained through search where government failed to disclose that evidence pretrial after Rule 12(d)(2)[8] request); *United States v. Anderson*, 416 F. Supp.2d 110, 112 (D.D.C. 2006) (where government seized 100 boxes of materials from defendant, "[d]efendant's entitlement under Rule 12(b)(4)(B), then, is clear: of the materials seized from Mr. Anderson's home and office, the government must notify the defendant of the evidence that it intends to use in its case-in-chief"). It is particularly not sufficient that the government maintains an "open file" discovery policy and leaves the defendant to figure out what evidence in discovery might be subject to suppression. *Cruz-Paulino*, 61 F.3d at 993 ("providing open-file discovery does not satisfy Rule 12[b][4][B]"); *United States v. Kelley*, 120 F.R.D. 103, 107 (E.D. Wis. 1988) (open file policy does not satisfy rule because "the defendant is still 'left in the dark' as to exactly what evidence discoverable under Rule 16, the government intends to rely upon in its case-in-chief at trial").[9]

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[8] Rule 12(b)(4)(B) was previously styled as Rule 12(d)(2).

Interpreted as Fed. R. Crim. P. 2 requires--to "secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay"-- Rule 12(b)(4)(B) grants the Court ample authority to compel the government to identify the evidence obtained through particular covert surveillance techniques. The government's interpretation--forcing the defense and the Court to guess what evidence was obtained through FISA and other covert surveillance techniques--would thwart the purposes Rule 2 identifies.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Mr. Mo's initial motion, the Court should Order the government (1) to provide notice of any covert surveillance techniques known to the DOJ NSD or the FBI Counterintelligence Division as to which Mr. Mo is an aggrieved person, to the extent the government intends to use or disclose any evidence obtained or derived from that surveillance; and (2) to identify the evidence obtained or derived from any surveillance as to which the government gives notice.

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[9] None of the cases cited by the government involving Rule 12(b)(4)(B) compels the denial of Mr. Mo's request here. The court in *United States v. Ishak*, 277 F.R.D. 156, 160-61 (E.D. Va. 2011), denied the defendant's request as being nonspecific and overbroad but then "directed" the government "to respond diligently" to a properly-framed request. The court in *United States v. Lujan*, 530 F. Supp.2d 1224, 1246 (D.N.M. 2008) essentially granted the same relief sought here, but in an oddly backhanded way: It required the government to identify the fruits of searches and seizures that it would *not* introduce in its case-in-chief. Finally, the defendant's motion in *United States v. MacFarlane*, 759 F. Supp. 1163, 1170 (W.D. Pa. 1991), was denied as moot because the government provided the requested information. Unlike any of the cited cases, the government here certainly has not "made disclosures that sufficiently allow [Mr. Mo] to make informed decisions whether to file one or more motions to suppress" evidence collected under FISA or related mechanism. *Ishak*, 277 F.R.D. at 158.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on Feb 3, 2015, by

- ☐ U.S. Mail
- ☐ FAX
- ☐ Hand Delivered
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